No. 74-1562

In the Supreme Court of the United States

OCTOBER TERM, 1975

ROSS B. MERETSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the district court (Pet. App. A) is not reported. The order of the court of appeals (Pet. App. B) is unreported

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on March 17, 1975. A petition for rehearing was denied on May 13, 1975 (Pet. App. C). The petition for a writ of certiorari was filed on June 12, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals applied a proper standard for testing the sufficiency of circumstantial evidence.

2. Whether the district court erred in denying severance.

3. Whether the district court erred in refusing to give a limiting instruction at the time co-conspirators' hearsay statements were introduced.

4. Whether the review by the court of appeals was adequate.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiracy to pledge, dispose of, and transport counterfeit and stolen securities, in violation of 18 U.S.C. 371 and 2314-2315, and of transporting forged securities, in violation of 18 U.S.C. 2314. He was sentenced to concurrent three-year terms of imprisonment and fined $5,000. The court of appeals affirmed (Pet. App. B).

1. The government's evidence showed that in April 1969 Joseph Pagoto, a Detroit builder (and later an unindicted co-conspirator), completed construction of a house for co-defendant Daniel Cimini (Tr. 133).[1] Two months later, with $19,000 still owing from Cimini, Pagoto notified Cimini of his intent to foreclose on the lien securing payment. Cimini requested more time (Tr. 137). Several hours later petitioner, an attorney, telephoned Pagoto and told him that Cimini intended to pay his debt but "had a different way of doing it" (Tr. 139). At petitioner's suggestion, Pagoto again contacted Cimini, who offered to give him shares of

[1]We are lodging with the Clerk of this Court the nine-volume trial transcript ("Tr.") and the separately paginated transcript of the hearing on petitioner's motion for a new trial.

Co-defendants Anthony and Daniel Cimini were both convicted on the first count of the indictment, charging conspiracy. Daniel Cimini was also convicted on seven substantive counts. The court of appeals affirmed their convictions (Pet. App. B); they do not join this petition.

stock in various corporations, which Pagoto could keep for a year or two and use to secure bank loans; at the end of that period Cimini would pay the $19,000 and retrieve the certificates (Tr. 140-141). Pagoto agreed and thereafter used the securities, later determined to have been stolen while in transit between the New York and Detroit offices of a brokerage house (Tr. 66, 71, 76), as collateral for loans he obtained for himself and for Cimini (Tr. 159, 178-183). Until June 1970, Cimini attempted to use additional stolen securities as collateral for various business transactions in Michigan, Massachusetts, and New York (Tr. 221-240, 720, 821-824, 910-913).

2. In late October 1969, Cimini advised Pagoto that he had an unidentified wealthy client who was interested in financing several subdivisions Pagoto proposed to build (Tr. 212, 217). In December, Cimini gave Pagoto 200 consecutively numbered certificates of Bethlehem Steel Corporation stock, each representing 100 shares. Cimini explained that the shares were made out to Pagoto because his client had decided that all aspects of the real estate venture should be in Pagoto's name (Tr. 188-189). In January 1970, Cimini gave Pagoto another 200 certificates of Bethlehem Steel stock, numbered consecutively from the previous group, and told him to hold them for use in another proposed real estate transaction (Tr. 192-193). The certificates were later shown to be counterfeit (Tr. 494-616). Pagoto did not know this, however, and used some of them as collateral for additional bank loans (Tr. 190).

Several weeks later Cimini requested that Pagoto endorse and return all of the certificates, claiming that his client had decided to sell the stock (Tr. 193). Pagoto signed his name on the 350 certificates he had not pledged with lenders and returned them to Cimini (Tr. 194). In June 1970, Cimini asked Pagoto to give him

several of Pagoto's letterheads so that petitioner could negotiate the certificates (Tr. 242). Pagoto brought the stationery to Cimini's office. A telephone call was made to petitioner, who dictated to Cimini's secretary a power of attorney for Pagoto to sign authorizing petitioner to sell the stock (Tr. 245-246, 1047-1048).

Petitioner then attempted to sell the securities to a Detroit stock broker. The broker and his supervisor went to petitioner's office, where they were shown a large number of the Bethlehem Steel shares that Pagoto had endorsed. The brokers told petitioner that the endorsed shares were negotiable and that for his protection petitioner should obtain a power of attorney and store the stock in a safe (Tr. 1063, 1118). Thereupon petitioner stamped his name on a line on each certificate, assigning himself power of attorney (Tr. 1064). Petitioner also told the brokers that his client would give a discount of $150,000 on the sale of the stock (which appeared to be worth approximately one million dollars), but that delivery to buyers would have to be delayed for ninety days (Tr. 1065, 1120, 1127). The amount of the discount and the extent of the delay were unusual (Tr. 1126, 1526-1527). The proposed sale was aborted when the brokers called a transfer agent in New York and were advised that no Bethlehem Steel securities were registered in the name of Joseph Pagoto (Tr. 1056, 1125).

Petitioner then attempted to obtain a $100,000 bank loan for an unidentified client, using some of the shares as collateral. The bank refused to make the loan because petitioner would not provide the name of his client, the purpose of the loan, or the manner in which it would be repaid. Petitioner had told a bank officer that this information was unnecessary given the large amount of collateral offered (Tr. 1395-1398).

3. In early September 1970, Pagoto, still in need of operating funds for building ventures, asked Kent Tomlinson, a Florida businessman and friend of Pagoto's, whether he knew anyone willing to make a $500,000 loan secured by Bethlehem Steel stock (Tr. 256). Tomlinson said that he did, whereupon Pagoto and Cimini went to Florida and were introduced by Tomlinson to Glenn Partins, a banker, who told them that Tomlinson had an outstanding loan of his own that was in jeopardy because the collateral used to secure it had lost value (Tr. 260). Cimini and Pagoto agreed to assist Tomlinson by giving him some of the Bethlehem Steel shares. Petitioner prepared an agreement, the terms of which prohibited Tomlinson from selling the stock or using it in other transactions (Tr. 263). On September 10, 1970, Pagoto sent certificates representing 3,400 shares of Bethlehem Steel to Tomlinson, who in turn gave them to Partins (Tr. 1204-1205).

On September 20, 1970, Pagoto and Cimini went to Florida again, this time with petitioner, on news from Tomlinson of tentative arrangements for two $100,000 loans for Pagoto (Tr. 283). They brought with them a number of the counterfeit securities and met with several potential lenders, but they were unsuccessful in obtaining the loans. On two occasions questions arose about the stock; Cimini and petitioner left the meeting room to confer before responding (Tr. 1328-1330). Petitioner several times told the prospective lenders that the stock was in Pagoto's name because Cimini, the true owner, was faced with a divorce action and did not want the stock in his name (Tr. 1330). Petitioner explained that his own name appeared on the certificates as Pagoto's endorsee so that his client, Cimini, would be protected (Tr. 1330).

4. During a routine inquiry of Partins' bank, it was discovered that the Bethlehem Steel shares furnished by Tomlinson were counterfeit (Tr. 1475-1503, 1509).

The ensuing FBI investigation led to the discovery of the other counterfeit and stolen securities used in various transactions by Pagoto and Cimini (Tr. 109-116).

ARGUMENT

1. Petitioner's assertion that in criminal cases the Fifth and Tenth Circuits apply a test for evaluating the sufficiency of the evidence different from the test used in the other circuits, notably the Sixth, is not accurate.[2] The Fifth Circuit has explained that, notwithstanding "verbalistic" differences, "we are in agreement with our brothers in other circuits that whether the evidence be direct or circumstantial, the matter of the defendant's guilt is for the jury to decide unless the court concludes that the jury must necessarily have had a reasonable doubt." *United States* v. *Warner*, 441 F.2d 821, 825 (C.A. 5), certiorari denied, 404 U.S. 829. The Tenth Circuit is in accord, *e.g.*, *United States* v. *Parrott*, 434 F.2d 294, 297 (C.A. 10), certiorari denied, 401 U.S. 979:

> [A]ppellant attacks the verdict on the ground that the evidence does not exclude every reasonable hypothesis but that of guilt. When the sufficiency of the evidence is challenged on appeal the test is not as appellant characterizes it. The sufficiency of the evidence shall be determined by a consideration of all the direct and circumstantial evidence, together with all inferences reasonably drawn therefrom. If, upon that consideration, there appears substantial evidence from which a jury can find an accused guilty beyond a reasonable doubt, the verdict will not be disturbed on appeal.

[2]Any challenge petitioner might be understood to be making to the sufficiency of the evidence to convict him must necessarily fail. Judged in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), the evidence of petitioner's guilt on both counts upon which he was convicted was clearly ample.

See also *United States* v. *Downen*, 496 F.2d 314, 318 (C.A. 10), certiorari denied, 419 U.S. 897. Thus, the law in the Fifth and Tenth Circuits is not inconsistent with the Sixth Circuit's holding in this case (Pet. App. B) that "circumstantial evidence need not remove every reasonable hypothesis except that of guilt." All three courts have followed the teaching of *Holland* v. *United States*, 348 U.S. 121, 139-140, and, accordingly, the conflict petitioner asserts does not exist.

2. Petitioner concedes (Pet. 17-18) that the denials by the district court of his first two motions for severance do not merit review by this Court.[3] Nor does the denial of his third motion. As the district court found (Pet. App. 7a-8a), the evidence at trial proved the existence of a single conspiracy to deal in stolen and counterfeit securities. Petitioner was shown to have been a primary participant in the dealings involving counterfeit stock. Contrary to his contention (Pet. 18), he was also proven to have had some involvement with the stolen securities, since it was his telephone call that apprised Pagoto that

[3]When joinder is proper under Rule 8, Fed. R. Crim. P., a motion for severance is committed to the discretion of the district court. See, *e.g.*, *United States* v. *Schaffer*, 362 U.S. 511; *Opper* v. *United States*, 348 U.S. 84. Here, joinder was proper because the offenses charged against the defendants were "of the same or similar character," and all defendants were alleged to have participated in one or more of them. That petitioner was not named on all of the substantive counts did not make joinder improper or necessarily warrant severance, since evidence of the commission of the substantive offenses by his co-defendants was admissible against him on the conspiracy count. See *United States* v. *Franks*, 511 F.2d 25 (C.A. 6), certiorari denied, No. 74-1281 (June 23, 1975); *United States* v. *Crockett*, 514 F.2d 64, 70-71 (C.A. 5).

As to petitioner's claim in respect of the check received from Cimini, petitioner at trial explained that he received it as payment for legal services (Tr. 2059, 2064, 2103-2104), and the district court's refusal to allow him to show that the legal services were rendered in connection with irrelevant convictions of a nontestifying defendant did not prejudice petitioner's substantial rights.

co-defendant Cimini had a "different way" to pay the amount owed on his new house. In any event, as a member of the overall scheme petitioner was liable for the acts committed by co-participants; accordingly, the evidence relating to the stolen securities would have been admissible even at a separate trial. *United States* v. *Felts*, 497 F.2d 80 (C.A. 5), certiorari denied, 419 U.S. 1051. Moreover, there was abundant proof of petitioner's guilt, and the district court instructed the jury to consider separately the guilt or innocence of each of the three defendants on trial (Tr. 2324). Under these circumstances, the denial of a severance was not an abuse of the district court's discretion.

3. Petitioner claims that the district court committed error by refusing to give limiting instructions in connection with hearsay evidence of co-conspirators' statements at the time such evidence was admitted. But the rule upon which petitioner relies, calling for instructions contemporaneous with admission, applies only in cases where the statements admitted were made after the conspiracy had ended and are offered to prove the declarant's participation in the conspiracy. *Lutwack* v. *United States*, 344 U.S. 604, 618. Petitioner does not claim that the conspiracy had ended when the co-conspirators' statements were made. Nor, indeed, does petitioner point to any such hearsay evidence which the jury improperly considered against him. Furthermore, petitioner did not object on hearsay grounds to any part of the district court's charge to the jury. Accordingly, there is no occasion for further review of this issue.

This Court has recently reaffirmed the co-conspirator exception to the hearsay rule, see *United States* v. *Nixon*, 418 U.S. 683, 701; petitioner's general attack on the exception suggests no sound reason for reconsidering the question.

4. Petitioner's complaint (Pet. 23) that he did not receive a "fair hearing" in the court of appeals is without substance. Even if petitioner had been denied all opportunity for oral argument, which he was not, and the court of appeals had affirmed with no opinion whatever, which it did not, the appellate process would not necessarily have been unfair. See *Taylor* v. *McKeithen*, 407 U.S. 191, 194-195 n. 4; *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 274-277. Petitioner points to no circumstance indicating that the court of appeals did not give all of his arguments, numerous as they were, all the consideration they deserved.[4]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1975.

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[4]Petitioner raises three additional contentions (Pet. 3-4) in addition to the claims already discussed, but states expressly (Pet. 27) that they are not urged as reasons why a writ of certiorari should issue, and accordingly we do not reply to them.